No. 11-0114

In The Supreme Court of Texas

State of Texas,

Petitioner,

v.

Angelique S. Naylor and Sabina Daly,

Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

RESPONDENTS' JOINT SUPPLEMENTAL RESPONSE ON *WINDSOR* AND *PERRY*

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Statement of the Case

Nature of the Case:	Angelique Naylor and Sabina Daly were legally married in Massachusetts in 2004. CR92. In 2009, Naylor petitioned for a divorce in Texas. CR91-102. The trial court granted the divorce on February 10, 2010. RR3:115. The State attempted to intervene the next day, and later filed a plea to the jurisdiction. CR240, 270.
Trial Court:	126th District Court, Travis County, The Honorable Scott Jenkins presiding.
Trial Court's Disposition:	On March 31, 2010, the trial court signed the divorce decree. See CR404. The court implicitly denied the State's intervention as untimely. RR4:41-42, 68; State's COA br. at 27 (acknowledging the court's implicit determination that the intervention was untimely). The State's appeal followed. CR485.
Parties in the Court of Appeals:	Appellant: State of Texas Appellees: Angelique Naylor & Sabina Daly
Court of Appeals:	Third Court of Appeals, Austin. Before C.J. Jones, J. Puryear, and J. Henson.
Court of Appeals' Disposition	The Court of Appeals (Henson, J.) held the State could not intervene because it lacked standing, and dismissed the appeal for lack of jurisdiction. *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed) (hereinafter cited as "Op."). No motions for rehearing were filed.

Statement of Jurisdiction

The Supreme Court lacks jurisdiction. None of the bases for jurisdiction under Government Code section 22.001(a) applies. This case does not involve a disagreement among the justices of the court of appeals; the court of appeals' dismissal of the State's appeal does not conflict with any prior decision of another court of appeals, or of this Court; the court of appeals' dismissal of the State's appeal does not involve the construction or validity of any statute; the case does not involve state revenue; the railroad commission is not a party; and the court of appeals did not err in holding the State lacked standing to intervene. *See* Tex. Gov't Code § 22.001(a)(1)–(6).

Because the court of appeals correctly applied the law and this Court lacks jurisdiction under section 22.001(a), the Court should deny the State's petition for review. Tex. R. App. P.56.1(b)-(c);

Issue for Supplemental Briefing

What legal impact, if any, do the United States Supreme Court's recent decisions in *United States v. Windsor* and *Hollingsworth v. Perry* have on the issues raised in the petition for review in this case?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents Naylor and Daly submit this supplemental brief as requested in the Clerk's July 3, 2013 notice, and respectfully show the Court as follows:

Factual and Procedural Background

Angelique Naylor and Sabina Daly—two women—were legally married in Massachusetts on September 27, 2004. CR133, 148. They adopted a child together. CR92. Then, in mid-2007, they separated. CR133. In mid-2009 they reached agreement over a suit affecting the parent-child relationship (SAPCR). CR32. Then on December 3, 2009, Naylor filed for divorce in Travis County District Court. CR91.

Daly contested Naylor's property claims, CR112–15, but neither party challenged the constitutionality of any Texas law, and the State of Texas was not named as a party to the suit for divorce. At a February 9, 2010 hearing on several motions, the trial court repeatedly encouraged the couple to resolve their disputes for the sake of their child. *E.g.*, RR2:63–64, 81, 88–89.

When the court reconvened the following day, Daly's counsel announced that the couple had settled all disputes. RR3:101. The agreement was read into the record, RR3:102–114, and the petition for divorce became uncontested. RR3:113-15. Daly's counsel asked the judge to grant the divorce, RR3:110; Naylor also asked the court to grant the divorce, RR3:115; and the court rendered judgment and granted the divorce. *Id.*

The State filed its petition in intervention the next day. CR240. It then filed a plea to the jurisdiction on February 23, 2010. CR270. Both Naylor and Daly opposed the intervention.

CR251, 356. And Naylor also opposed the plea to the jurisdiction. CR364.

The court stated that "the judgment was granted on February 10th," and the court emphasized the finality of that judgment. RR4:67-68. Then the court signed the agreed judgment and implicitly rejected the State's intervention as untimely. *See* RR4:70; State's COA br. at 27 (acknowledging the trial court's implicit determination that the intervention was untimely). The State's appeal followed. CR485.

The court of appeals dismissed the State's appeal, holding that the State was not a party of record, that it failed to meet any of the requirements for intervention, and that it lacked standing to appeal the divorce decree. Op. at 436, 439–444.

The State filed its petition for review on March 21, 2011. Naylor and Daly filed their response on June 27, 2011. The State filed its brief on the merits on September 19, 2011. Naylor and Daly filed their response on the merits on October 17, 2011. And the State filed its reply on November 1, 2011. The United States Supreme Court then decided *United States v. Windsor* and *Hollingsworth v. Perry* on June 26, 2013, and on July 3, 2013, this Court requested supplemental briefing to consider the possible impact of those decisions.

Summary of the Argument

This case is about standing: whether the State can intervene as a third party to appeal an uncontested divorce decree. There is ample basis in Texas law for this Court to affirm the court of appeals' holding that the State has no right to intervene and no standing to appeal. But, because standing is a prerequisite for maintaining an action under both Texas and federal law, this Court also looks to the United States Supreme Court for guidance on questions of standing. Should this Court choose to do so here, it will find that the U.S. Supreme Court's decision in *Hollingsworth v. Perry* supports the court of appeals' decision to dismiss the State's appeal for lack of standing.

In *United States v. Windsor* the Court held that a law that "impose[s] inequality" on gays and lesbians, and that treats same-sex marriages as "second class," violates the constitutional principles of due process and equal protection. But neither Naylor nor Daly challenged the constitutionality of any law in their divorce action—and neither the trial court nor the court of appeals addressed the constitutionality of any Texas law in its decision. (This is precisely why the State lacks any basis for intervening, and lacks standing to bring an appeal.)

Even if the Court were to permit the State to intervene, and thus were to reach the question of whether Texas law prevents Naylor and Daly from obtaining a divorce, the rules of statutory construction would require the Court to avoid construing Texas

law in a way that raises constitutional issues. Thus, without having to consider *Windsor*, the Court should construe Texas law as not denying Naylor and Daly equal access to divorce.

If, however, the Court grants the Executive an expansive new power to intervene in private judicial proceedings, and if the Court also accepts the State's position that Texas law denies Naylor and Daly equal access to a divorce in Texas, then—under the principles articulated by the U.S. Supreme Court in *Windsor*—the Court should declare Texas law unconstitutional.

Argument

I. *Hollingsworth v. Perry* supports dismissing the State's appeal for lack of standing.

As Naylor and Daly demonstrated in their joint brief on the merits, there are only three possible bases for the State's intervention in a civil action: (1) the State can intervene under section 37.006(b) of the Civil Practice & Remedies Code, to defend a direct challenge to the constitutionality of Texas law; (2) the State can intervene under Texas Rule of Civil Procedure 60, if it has standing to bring some part of the original action in its own name; or (3) the State can intervene on appeal under the judicially created "virtual representation" doctrine, if the State is in some way bound by the judgment it seeks to appeal. *See* Resp. Br. at 11–20.

Here, the court of appeals correctly found that (1) there was no direct challenge to—nor any ruling on—the constitutionality of any Texas law in the trial court, Op. at 441; (2) the State had no standing to bring any part of the original suit for divorce, *see id.* at 442; and (3) the State is not bound in any way by the trial court's divorce decree, which binds no one but Naylor and Daly. *Id.* Thus, the court of appeals correctly held that the State cannot intervene and has no standing to appeal the trial court's judgment. Op. at 444.

Undeterred by the court of appeals' recitation of the law, the State now asserts in this Court that the Executive Branch has an inherent right to intervene in private actions—post-judgment—whenever it deems necessary. *See* State's Br. at 10–14. Citing no authority to support such an expansive intervention right, the State essentially asks this Court to create a new Executive power. *See* Resp. Br. at 16–18. But under the principle of separation of powers, the Court should refrain from performing the legislative function of creating standing for the Executive Branch where it did not previously exist. *See Perry v. Del Rio*, 67 S.W.3d 85, 91–92 (Tex. 2001) (separation of powers means that one government branch should not exercise a power attached to another).

This Court has ample precedent to support affirmation of the court of appeals decision dismissing the State's appeal for lack of

standing. *See* Resp. Br. at 9–20. But, because standing is a constitutional prerequisite to maintaining an action under both Texas and federal law, this Court has often looked to the U.S. Supreme Court for guidance on standing issues. *E.g.*, *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2003); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (the Court sometimes looks to "the more extensive jurisprudential experience of the federal courts" for guidance on questions of standing). And the U.S. Supreme Court's decision in *Hollingsworth v. Perry*, 570 U.S. --- (2013) (cited hereafter as "*Perry* Slip Op."), further supports dismissal of the State's appeal for lack of standing.

In *Perry*, two couples sued officials of the State of California, directly challenging the constitutionality of California's voter-approved Proposition 8, which sought to bar same-sex marriage. *Perry* Slip Op. at 3. The State of California refused to defend Prop 8, so a third-party group of citizens who had supported Prop 8 sought to defend it. *Id.* The district court allowed the intervention; but after the district court ruled Prop 8 violated Equal Protection—even under the most deferential, rational-basis review, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994–1002 (N.D. Cal. 2010)—the question arose as to whether the third-party supporters of Prop 8 had standing to appeal. *Perry* Slip Op. at 3. After obtaining the opinion of the California

Supreme Court, the Ninth Circuit decided the third-party group did have standing, and a panel heard the appeal and affirmed the district court's ruling that Prop 8 was unconstitutional. *Id.* at 3–5. But the Supreme Court reversed the Ninth Circuit, holding that the third-party group lacked standing to appeal the district court's judgment. *Id.* at 17.

Along the way, the Supreme Court discussed at length the law of standing, which begins with the requirement that a court exercise its jurisdiction only where there is a justiciable case or controversy. *Id.* at 5. "For there to be such a case or controversy," wrote Chief Justice John Roberts, for the Court, "it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also . . . have suffered a concrete and particularized injury." *Id.* at 2. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself." *Id.* at 6 (internal quotations omitted). There must be "a personal and tangible harm" that is "likely to be redressed by a favorable judicial decision." *Id.* at 5–6.

Specifically, according to the Supreme Court, the third-party group in *Perry* lacked standing to appeal the district court's judgment because the court "had not ordered them to do or refrain from doing anything." Thus, the group was not directly injured by the judgment, and had no standing to appeal it. *Id.* at 7.

Here, the same can be said for the State of Texas's attempt to appeal Naylor and Daly's uncontested divorce. The State's zealous desire to deny legally married same-sex couples the right to a divorce is not enough to give the State standing to appeal a divorce, because the State cannot show any injury resulting from the divorce decree. The decree does not order the State "to do or refrain from doing anything"—indeed, the decree affects no one but Naylor and Daly. Thus the State has no standing to appeal it.

Of course, as the Supreme Court noted in *Perry*, "No one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional." *Id.* at 11 (internal quotations omitted). But here no such judicial decision exists; neither the trial court nor the court of appeals ruled on the constitutionality of any Texas law. Thus the State cannot claim that it was harmed by the agreed divorce, which has no precedential effect and does nothing to prevent the State from enforcing its laws to bar same-sex marriage in Texas.

Even if the State were right, and the trial court's decision to grant the divorce was improper under Texas law, it would be for a party to that judgment (Naylor or Daly) to challenge the ruling's impropriety. The Executive Branch simply does not have the power to intervene and appeal a judicial decision just because it believes the court misapplied the law.

As the Supreme Court put it in *Perry*: "The doctrine of standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* at 6. In other words, *Perry* reinforces the principle of separation of powers, and supports dismissal of the State's appeal in part to preserve that separation.

Though *Perry* is all about third-party standing to bring an appeal—and though the State asks this Court to review a decision that is all about third-party standing to bring an appeal—the State inexplicably dismisses *Perry* because it "does not address the merits of the [constitutional] challenge to Proposition 8." State's Supp. Br. at 16. While it is true that *Perry* did not discuss the merits of Prop 8, there is no denying its relevance to the standing issues addressed by the Third Court of Appeals.

By dismissing *Perry* in this way (and by devoting all its attention to *Windsor*), the State reveals its fixation on constitutional issues that were never raised by any party to this action, and never addressed by any court below. This cannot be enough to give the State standing to appeal the trial court's judgment.

Under this Court's own precedent, and under the principles articulated in *Perry*, this Court should deny the State's petition for review.

II. Even if the State could bring its appeal, the rules of statutory construction require the Court to construe section 6.204 as not applying to Naylor and Daly's uncontested petition for divorce.

In *United States v. Windsor*, the U.S. Supreme Court held that section 3 of the Defense of Marriage Act (DOMA) was unconstitutional in its restriction of marriage, for the purposes of federal law, to only opposite-sex couples. Thus, *Windsor* has an impact on this case only if the State has standing to bring its appeal in the first place (which it does not), and only if constitutional questions arise regarding Texas laws that restrict marriage to only opposite-sex couples. Such constitutional questions arise only if section 6.204 of the Family Code is construed as denying Naylor and Daly access to a divorce. Thus, *Windsor*'s impact depends on how this Court construes section 6.204.

Section 6.204 states, in relevant part, that

> the state may not give effect to a (1) public act, record, or judicial proceeding that creates, recognizes, or validates a *marriage* between persons of the same sex … in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a *marriage* between persons of the same sex … in this state or in any other jurisdiction.

Tex. Fam. Code § 6.204(c) (emphasis added).

But this case is about *divorce*, not marriage. Granting Naylor and Daly a divorce did not "give effect" to their marriage;

it dissolved their marriage. And Naylor and Daly did not ask the district court to "give effect" to a "claim to any legal protection, benefit, or responsibility" resulting from their marriage; they asked only to dissolve their marriage. In short, section 6.204 can be reasonably construed as not being implicated by, and not applying to, a simple, uncontested petition for divorce brought by a same-sex couple that was legally married in another state.

And it must be noted that the rules of statutory construction require this Court, "if possible, [to] construe statutes to avoid constitutional infirmities." *Williams v. Texas State Board of Orthotics & Prosthetics*, 150 S.W.3d 563, 571 (Tex. 2004). The Court "must interpret the statutory language in a manner that renders it constitutional if it is possible to do so," and should avoid a construction that renders the statute "constitutionally suspect." *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006).

As Naylor and Daly have argued, to construe section 6.204 of the Family Code as denying Naylor and Daly equal access to a divorce would be to render the statute constitutionally suspect. Resp. Br. at 31–49. Thus, the Court should construe the statute as not being implicated by, and not applying to, Naylor and Daly's uncontested petition for divorce, so as to avoid constitutional infirmities. *Id.* at 21–31.

If the Court follows its own rules of statutory construction, then no constitutional questions arise, and the Court need not consider *Windsor*'s impact on this case.

III. If this Court allows the State to intervene on appeal and construes section 6.204 as denying Naylor and Daly equal access to a divorce, then section 6.204 is unconstitutional under *United States v. Windsor*.

A. *Windsor* held that DOMA violated principles of due process and equal protection.

Under the most deferential standard of equal-protection review, a court will uphold a statute that treats a class of persons differently from others as constitutional, as long as it is reasonably related to a "legitimate" government interest. *Romer v. Evans*, 517 U.S. 620, 632 (1996). This is known as "rational basis" review. But rational-basis review, though deferential, must nevertheless "ensure that classifications are not drawn for the *purpose* of disadvantaging the group burdened by the law." *Id.* at 633 (emphasis added). In *Romer*, the Supreme Court applied rational-basis review and still held that a law that is motivated by "animus" toward gays and lesbians, singling them out for disfavored treatment, is unconstitutional—because "to harm a politically unpopular group cannot constitute a legitimate government interest." *Id.* at 631–635.

In *United States v. Windsor*, 570 U.S. --- (2013), the Supreme Court reinforced the analysis that had been applied in *Romer*, by

applying it to laws that deprive same-sex couples of the benefits of marriage.

In *Windsor*, Edie Windsor was legally married to another woman according to New York state law. When Windsor's spouse died, however, the federal government denied her a tax benefit that was typically available to surviving spouses, because section 3 of DOMA restricted "marriage," for the purposes of federal law, to "only a legal union between one man and one woman." 1 U.S.C. § 7. So Windsor sued.

After examining the nature and history of DOMA, the Supreme Court found that its *purpose* was "to impose restrictions and disabilities" on same-sex couples who had been legally married; that its "essence" was "interference with the equal dignity of same-sex marriages"; and again, that its "demonstrated *purpose*" was "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law." *Windsor* Slip Op. at 19, 21–22 (emphasis added). The Court found that DOMA was clearly motivated by "animus" toward gays and lesbians, *id.* at 20 (citing *Romer*), and concluded that its "principal *purpose*" was "to impose inequality." *Id.*at 22 (emphasis added). The Court then went on to detail some of the ways in which legally married same-sex couples were treated unequally, and "burdened" by DOMA's preference for opposite-sex marriages. *Id.* at 23–24.

For these reasons, the Court held that DOMA's definitional restriction of marriage to only opposite-sex couples was unconstitutional, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" those same-sex couples who have been legally married under state law. *Id.* at 25.

Notably, by citing *Romer* and other rational-basis cases (e.g., *United States Dept. of Agriculture v Moreno*, 413 U.S. 528 (1973)); by focusing on DOMA's "animus" toward same-sex couples (using a key term from *Romer*); and by holding that DOMA's restrictive definition of marriage could not be sustained by any "legitimate" purpose, *Windsor* Slip Op. at 25, the Supreme Court made it clear in *Windsor* that DOMA was unconstitutional even under rational-basis review.

Justice Scalia, in dissent, complained that the majority's decision was unclear about the level of scrutiny being applied. *Id.* (Scalia, J., dissenting) at 16–17. But even Justice Scalia admitted that *Windsor*'s "central propositions are taken from rational-basis cases." *Id.* at 17. And again, the Court stated explicitly that DOMA was invalid because "no *legitimate* purpose overcomes the purpose and effect to disparage and to injure," *Windsor* Slip Op. at 25 (emphasis added)—thereby using the "legitimate" standard proper to rational-basis review.

In short, under *Romer* and *Windsor* it does not matter if so-called "legitimate" purposes can be proffered in support of a law

that discriminates against gays and lesbians. "[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure." *Windsor* Slip Op. at 25. If the law's purpose and effect are "to impose inequality" on gays and lesbians, then that law is unconstitutional.

Of course, in *Windsor* the Supreme Court invalidated DOMA under the Fifth Amendment, which applies against the federal government. *Id.* But the Supreme Court also went out of its way to recognize that the Fourteenth Amendment, which applies against the states, makes the principles and rights of due process and equal protection "all the more specific and all the better understood and preserved." *Id.* Put another way: If it is wrong under the Fifth Amendment for the federal government to treat legally created same-sex marriages as "second class," then it is also wrong under the Fourteenth Amendment for a state government to treat legally created same-sex marriages as "second class."

Importantly, *Windsor* is relevant to this case only if the State is granted a new power to intervene post-judgment to appeal a private, uncontested divorce decree, and only if section 6.204 is construed as the State would have it, to deny Naylor and Daly access to a divorce. If construed this way, then section 6.204 applies precisely as the federal government was applying section 3 of DOMA—to impose inequality on legally married

same-sex couples, treating them as second class. Whereas the federal government had denied a same-sex couple (legally married under New York law) equal access to tax benefits, here the State of Texas seeks to deny a same-sex couple (legally married under Massachusetts law) equal access to divorce.

The State's efforts are particularly egregious here, where Naylor and Daly were granted their uncontested divorce in February 2010. At the time, the trial judge reiterated its primary concern for the interests of the child involved, and pleaded with the State to reconsider its effort to intervene and to instead "conclude that the wise and merciful thing to do in this case is to simply leave these parties alone." RR4:68–70. But the State has ignored the trial judge and rejected the holding of the court of appeals, and continues—three years later—to disrupt the lives of two women and their child by trying to undo a private divorce.

In doing so, the State even relies in part on the restrictive definition of marriage found at article I, section 32 of the Texas Constitution, *e.g.*, State's Supp. Br. at 10, which mimics the restrictive definition in DOMA that was stricken as unconstitutional in *Windsor*. *Compare* Tex. Const. art. I, § 32 *with* 1 U.S.C. § 7.

There is no need to argue whether the State's purpose is to impose inequality on same-sex couples, because the State openly admits it. In *In the Matter of the Marriage of J.B. and H.B.*,

No. 11-0024, while in the Fifth Court of Appeals, the State declared without reservation that the unequal treatment of same-sex couples is "precisely the point" of section 6.204. State's *J.B.* COA Reply Br. at 7. And in this case, in the Third Court of Appeals, the State touted the superiority of opposite-sex unions, saying they "deserve special societal support and protection"—and admitted openly that Texas law seeks to "distinguish" between opposite-sex couples and same-sex couples "when allocating legal rights." State's *Naylor* COA Br. at 23–24.

The State has maintained this position in this Court, unapologetically asserting that opposite-sex unions are "special" and "uniquely deserving of special societal support and protection." State's Br. on Merits at 45. And the State has openly admitted that Texas law "allocat[es] legal rights" by "[p]roviding the legal benefits of marriage . . . including the protections of divorce" to opposite-sex couples while denying those rights, benefits, and protections to same-sex couples. *Id.* at 45–46. It is difficult to see how this could be anything other than an admission that Texas law deliberately imposes inequality on gays and lesbians.

Even the State's most recent brief—though much more carefully worded after *Windsor*—continues to declare that the "purpose" of defining marriage as a union only between a man and a woman is "to support and recognize" only opposite-sex

households as "a stable environment" for having and raising kids. State's Supp. Br. at 10. This flies directly in the face of *Windsor*, wherein the Supreme Court rejected this view and invalidated DOMA's restrictive definition of marriage in part because "it humiliates tens of thousands of children now being raised by same-sex couples." *Windsor* Slip Op. at 23.

Indeed, even after *Windsor* the State would have this Court believe that somehow the State's purpose can be "preserving and promoting" opposite-sex marriages without simultaneously treating same-sex marriages as "second tier." *Compare* State's Supp. Br. at 10–11 *with Windsor* Slip Op. at 23. Remarkably, the State contends Texas law "cannot possibly 'demean' a 'lawful same-sex marriage,' because there are no lawful same-sex marriages in Texas," *id.* at 10—as if the State's outright, unabashed dismissal of a lawful marriage's existence "cannot possibly" be demeaning.

It simply could not be more clear, according to the State itself, that the **purpose** of Texas law is to impose inequality on same-sex marriages that were legally created in another state. The text of section 6.204 says as much, insofar as it explicitly declares that same-sex marriages legally created in another state shall not be recognized or accorded the same respect or validity as opposite-sex marriages. Tex. Fam. Code § 6.204. And the **effect** of section 6.204—if the State has its way—is to impose

inequality on Naylor and Daly by denying them the same access to a divorce that any other couple that had been legally married in another state would have.

This is precisely the sort of unequal treatment that was condemned by the U.S. Supreme Court in *Windsor*. Just as the federal government's reliance on DOMA to treat same-sex marriages as second class violated the Fifth Amendment, the State's reliance on section 6.204 (and article I, section 32) to treat same-sex marriages as second class violates the Fourteenth Amendment. *See Obergefell v. Kasich*, Order Granting Plaintiffs' Motion for Temporary Restraining Order, Case No. 1:13-cv-501, at *2 (S.D. Ohio July 22, 2013), *available at* http://goo.gl/PCO2v, (citing *Windsor* and granting injunction because, "[b]y treating lawful [out-of-state] same-sex marriages differently than it treats lawful [out-of-state] opposite-sex marriages," Ohio state laws barring recognition of out-of-state same-sex marriages are unconstitutional).

Indeed, the same language that the Supreme Court applied to the federal government in *Windsor* can be readily adapted and applied to the State of Texas:

> The class to which [section 6.204] directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by [another] State. [Section 6.204] singles out a class of persons deemed by [another] State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the

> class by refusing to acknowledge a status [another] State finds to be dignified and proper. [Section 6.204] instructs all [state] officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The [state law] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom [another] State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the [state law] is in violation of the [Fourteenth] Amendment.

See Windsor Slip Op. at 25–26.

If the State is right, and section 6.204 and other provisions of Texas law must be construed as denying legally married same-sex couples their right to an uncontested divorce, then—according to the constitutional principles articulated in *Windsor*—those provisions of Texas law should be declared unconstitutional.

B. The Supreme Court stated explicitly that its decision in *Windsor* was not based on federalism.

In its supplemental brief, the State asserts that "the principles of federalism" are key to the Supreme Court's holding in *Windsor*. State's Supp. Br. at 2, 5–9. But, while it is true that the Court discussed the states' prerogative to regulate marriage and domestic relations, the Court declared in no uncertain terms that this prerogative "must respect the constitutional rights of persons" and is "subject to those guarantees." *Windsor* Slip Op.

at 16 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The Court recognized that marriage laws "may vary . . . from one State to the next"—but again, the Court noted that this is "subject to constitutional guarantees." *Id.* at 18. And the Court ended its overview of state-based family law by explicitly *rejecting* "principles of federalism" as a basis for its ruling. *Id.* ("The State's power in defining the marital relation is of central relevance in this case *quite apart from* principles of federalism." (emphasis added)).

The State ignores this and expressly misreads *Windsor*, claiming repeatedly that the case is about federalism and that DOMA's "interference with the States' traditional role in defining the marriage relationship subjected the statute to heightened judicial scrutiny." State's Supp. Br. at 5–6. This is simply false.

It is true that the Supreme Court repeatedly emphasized that DOMA interferes with "the equal dignity of same-sex marriages" that have been recognized by some states through "the exercise of their sovereign power." *Windsor* Slip Op. at 21. But as the Court made clear, these references to state sovereignty are not meant to invoke "principles of federalism." *E.g.*, *id.* at 18 ("The State's power in defining the marital relation is of central relevance in this case *quite apart from* principles of federalism." (emphasis added)).

The relevance of the state's sovereign power to define marriage, according to the Court, is in the State's power to create "a lawful status." *Id.* at 20. "This status is a *far-reaching* legal acknowledgment of the intimate relationship between two people." *Id.* (emphasis added). Marriage is "far-reaching" as a legal status because, for example, when a couple gets married under the laws of Massachusetts, that status is typically portable and recognized in other states—such as Texas. And when a state exercises its power to recognize same-sex marriages, the state confers on same-sex couples the same lawful status that it confers on opposite-sex couples. *Id.*

In *Windsor*, the Supreme Court held that DOMA is unconstitutional **not** because it interfered with the states' traditional role and violated principles of federalism, but because it deprived legally married same-sex couples of their "lawful status." *Id.* In other words, *Windsor* holds DOMA is unconstitutional **not** for what it does to states (by encroaching on their realm of power), but for what it does to individuals (by depriving them of their lawful status).

Put yet another way: The Supreme Court, in *Windsor*, extolled the states' sovereign power to "give further protection and dignity" to gays and lesbians, by "giv[ing] their lawful conduct a lawful status." *Id.* And the Court struck down the federal government's attempt to deprive gays and lesbians of that

status. *Id.* ("DOMA seeks to injure the very class New York seeks to protect."). But it is a gross misreading of *Windsor* to suggest, as does the State of Texas, that the Court's paean to a state's power to provide equal status to gays and lesbians can somehow be twisted into a defense of the State's "refusal to recognize out-of-state same-sex marriages." *See* State's Supp. Br. at 6.

The State argues that reading *Windsor* as supportive of invalidating state laws that refuse to recognize out-of-state same-sex marriages "would allow one state to project its marriage laws into all other States as its residents emigrate across the country." State's Supp. Br. at 12. According to the State, it is "staggering" that a same-sex couple legally married in Massachusetts should think that they should be married wherever they go. *Id.* at 14. According to the State, this would "mak[e] a mockery of the principle, recognized in *Windsor*, that each State has authority to define and regulate marriage within its borders." *Id.*

The State continues to expressly misread *Windsor*, which actually recognizes—repeatedly—that each state has authority to define and regulate marriage within its borders, "*subject to constitutional guarantees*." *E.g.*, *Windsor* Slip Op. at 18 (emphasis added). Apparently the State forgets that its argument against having to recognize marriages it doesn't like has been made before, in defense of state laws refusing to recognize lawful out-of-state marriages between persons of a different race. *See*

Loving, 388 U.S. 1. Simply put, the State has *no authority* to define and regulate marriage, or to refuse to recognize out-of-state marriages, where doing so violates principles of due process and equal protection. *Windsor* Slip Op. at 16 (state has authority to define and regulate marriage "subject to constitutional guarantees") (citing *Loving*, 388 U.S. 1).

The State of Texas effectively admits that, by denying Naylor and Daly access to divorce, it seeks to do through section 6.204 of the Family Code (and through article I, section 32 of the Texas Constitution) precisely what the federal government sought to do through DOMA—namely, "to injure the very class [Massachusetts] seeks to protect." Texas law on its face imposes inequality on legally married same-sex couples, treating their legal out-of-state marriages as null. And the State would further apply Texas law to deprive legally married same-sex couples like Naylor and Daly equal access to divorce.

Under *Windsor*, such treatment violates the principles of due process and equal protection. Texas has the power to regulate marriage and domestic relations within its own borders, but only subject to constitutional guarantees. Under *Loving*, *Romer*, *Lawrence*, and *Windsor*, the State of Texas does not have the power to prevent or reverse the district court's divorce decree.

Prayer

For these reasons and for the reasons already presented in Naylor and Daly's prior briefing, Naylor and Daly respectfully ask this Court to deny the State's petition for review, or to grant it and to affirm the court of appeals' dismissal for lack of standing. Or, to hold that section 6.204 applies only to marriage—not to an uncontested divorce—and therefore does not preclude a Texas court from granting an uncontested divorce to a same-sex couple that was legally married in another state. Or, to the extent that section 6.204 and other provisions of Texas law are construed to prevent legally married same-sex couples from obtaining a divorce in Texas, Naylor and Daly ask this Court to hold that these laws are unconstitutional.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Petitioner's Supplemental Brief on *Windsor* and *Perry* was forwarded to counsel of record by email on this 29th day of July 2013.

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Certificate of Compliance

In compliance with Texas Rule of Appellate Procedure 9.4(e), this brief uses a conventional typeface no smaller than 14-point. And in compliance with Rule 9.4(i)(2), this brief contains 5,684 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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